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## Teaching Federal Courts: Federal Judges as Problem Solvers

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## **TEACHING FEDERAL COURTS: FEDERAL JUDGES AS PROBLEM SOLVERS**

MICHAEL J. GERHARDT\*

### **INTRODUCTION**

I appreciate the opportunity to join the wonderful scholars contributing to this symposium on teaching Federal Courts. This past year marked my twentieth anniversary teaching as a law professor. In those two decades, my principal regret has been that I have not taught Federal Courts as often as I would have liked. The fact is that I have found no law school course more enjoyable—and more challenging—to teach than Federal Courts.

Indeed, my hope in this Essay is to share the enjoyment—and the challenges—I have had in teaching Federal Courts (or Federal Jurisdiction, as it has been called at the schools at which I have taught it). I hope to convey some useful ideas on how to get students excited to take the class, including how to meet the formidable challenges of teaching Federal Courts. I am sure that the challenges of teaching a class on federal courts are familiar to anyone who has ever taught or taken the course. I hope the enjoyment is just as familiar.

In particular, I have three objectives in this essay. First, I discuss why I find teaching a class on federal courts to be so enjoyable. I enjoy the other courses that I regularly teach, including Constitutional Law and Legislative Process; however, as I explain below, Federal Courts classes provide the rare opportunity for teachers and students to explore together how everything else they have learned about the law can fit together and to cultivate the (practical) skills and knowledge to address the complex problems arising in federal jurisdiction.

Second, I discuss the challenges of teaching Federal Courts and how I have tried to meet those challenges. I doubt that I am unusual in how I teach Federal Courts—namely, aiming not only to illuminate certain topics for the students but also to help students to hone the skills they need to meet the principal challenges of the class, including but not limited to understanding the

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complex subject matter and overcoming misconceptions (or presuppositions) about federal (and state) courts and the utility of a course on federal courts. I stress to my classes that Federal Courts is a course not just for prospective law clerks, but for any students interested in how to use what they have learned in law schools to solve significant and invariably complex problems. To focus our class discussions, I routinely assign students roles ranging from federal and state judges to legal counsel to a variety of federal and state departments and agencies.

Third, I share three of my experiences in teaching Federal Courts that I hope other instructors (and hopefully students) will find useful. In particular, I discuss the excitement and challenges of teaching Federal Courts while (1) the litigation over the 2000 presidential election was unfolding, (2) I was preparing testimony before the House Judiciary Committee on proposed court-stripping measures, and (3) I was writing about—and the Supreme Court was considering an analogous case on—the scope of municipal liability under 42 U.S.C. § 1983<sup>1</sup> on the basis of inadequate police training.<sup>2</sup> As these examples show, I like to challenge students to consider how to use what they learn in our class in addressing real-world examples, i.e., cases or disputes that are really happening and that students are reading about in the newspapers, are hearing discussed on the news, or are talking about with their friends. I hardly confine class discussions to contemporary or pending issues, but I have found real cases help to focus the attention of students and, particularly, to make the course seem more concrete and pertinent to them. I also challenge students to think about how to consider the issues we cover from different perspectives (or, more basically, whether they expect they will think about them differently if their roles are different). These examples underscore not only how the practical and theoretical come together in a Federal Courts class, but also how federal courts are tasked to function as unique problem solvers in our constitutional order.

#### I. THE JOYS OF TEACHING AND TAKING FEDERAL COURTS

I am sure the reasons that I enjoy teaching Federal Courts are not unique. Although it might be tangential to the main purpose of this symposium for me to share the reasons that I enjoy teaching Federal Courts, I believe they bear some relevance on our endeavor since they may also constitute reasons for students to enjoy the class as well. The point is not just to convey my enthusiasm for the course, but also to discuss why students should enjoy taking the course themselves.

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1. See 42 U.S.C. § 1983 (2006).

2. See *infra* notes 16–17 and accompanying text.

First, Federal Courts is one of the few classes taught in American law schools that enables students to coordinate just about everything they have been taught, or that they have done, in law school. In my experience, very few students, at least by the time they take a Federal Courts class, have been given any opportunities to figure out how to fit together the different doctrines, skills, and theories they have learned thus far in law school. As they enter into a Federal Courts class, they are likely to be thinking that law school is principally about the teaching—and learning—of various discrete subject areas of the law. But, in a Federal Courts class, I take delight in showing that Federal Courts provides a prism through which students can view virtually all the other subjects that they studied, including, but not limited to Constitutional Law, Civil Procedure, Intellectual Property, Torts, Bankruptcy, Evidence, Securities, Tax, and Commercial Law. Of course, law students do not need to know the substance of these subjects in order to take a Federal Courts class. There are, at least where I have taught, no formal prerequisites for taking a Federal Courts class, though I can sometimes see on students' faces their surprise in recognizing how something they learned in another course makes its way into our casebook<sup>3</sup> or class discussions.

Like a good physical workout, teaching Federal Courts is hard, but it is gratifying. You can feel good while you are doing it and even better after you have done it. It is, at the very least, a good mental exercise. But, it is fun in a different way than any other class I have taught. Constitutional Law classes are fun because they tend to feature cases or disputes that are often familiar to students, are historically important, and require students to check their emotions and prejudices at the door. In Constitutional Law classes, my focus has thus been primarily on the U.S. Constitution, modes of constitutional argumentation, interpretive theories and methodological approaches, and particular subjects common to such courses, such as the Commerce Clause and Separation of Powers. Legislative Process classes can also be fun since they are oftentimes introducing students to an important but vastly underappreciated realm of legal decisionmaking. Consequently, in my Legislative Process classes, the focus has been on the structure and logistics of the lawmaking process at the federal and state levels, legislative drafting, and statutory construction. But, the focuses in both Constitutional Law and Legislative Process classes turn out to be relatively narrow compared to the focus that we take in Federal Courts, where everything—or anything—seems to go. It is not an understatement to say that the materials cover almost every subject covered in law schools (and then some). It is gratifying to help

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3. The casebook that I use is RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (5th ed. 2003). There are many excellent casebooks, but I use this book because of its comprehensive coverage and utility as a resource.

students discover that the world of law does not consist of discrete subjects but that these subjects can be integrated, coordinated, or fit into a coherent whole. It is fun for students to learn not only how the vast world of the law can actually fit together coherently but also how it can look from the perspective of federal courts.

Second, the subjects in Federal Courts classes are almost always fun and hugely important. One of the things a Federal Courts class shares with a Constitutional Law class (and many other courses) is that one can be sure, no matter when the class is taught, there will always be something big in the field happening at the same time. Every time I have taught Federal Courts it has coincided with at least one major dispute that is winding its way through or on the verge of being filed in federal courts. Students easily discover that what they are studying is not irrelevant to their lives, the law, or the world at large, but rather is unfolding before them. Students can read briefs in pending cases or, as we have regularly done, contemplate the arguments that the parties will make in disputes that seem bound for the federal courts.

And, of course, the cases that we study involve many, if not the most, significant legal questions. There are not just questions of life and death (as is often the case with state and federal habeas) but also justice, due process, the “essential functions” of federal courts (particularly the Supreme Court),<sup>4</sup> the relationship between procedure and substance, the relationship between the courts and other public institutions, the significance of life tenure, and public accountability. If that is not enough to get people going, then there are questions about judicial selection (including the measures of merit and ideology) and what difference it makes for federal or state courts to be involved in various disputes, including those involving state or federal elections, the “myth of parity,”<sup>5</sup> the constitutionality of subjecting American citizens to military tribunals, the minimal requirements of due process, racial and other kinds of gerrymandering, and the appropriate remedies (and forums) for redressing violations of federal rights by local or state authorities. There is perhaps no more of an eye opener in a Federal Courts class than the Court’s Eleventh Amendment decisions, which challenge students in numerous ways to reconcile the text of the amendment with the jurisprudence and the ramifications of the jurisprudence for violations of federal rights, or interests, by local or state authorities.

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4. The notion of “essential functions” comes from Henry Hart’s classic dialogue on federal jurisdiction. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–70 (1953); see also FALLON ET AL., *supra* note 3, at 348–52.

5. For the classic article on the subject, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

Third, a Federal Courts class provides critical opportunities for students to think about some big questions (and topics) that they are unlikely to have thought about before. One such issue that I perhaps enjoy more than any other is exploring the parity between federal and state courts.<sup>6</sup> Some students might have given some thought to this in the abstract and others might have encountered it in a Constitutional Law class, but it is fundamental in a Federal Courts class. More so than any other course that I have taught, I have found that a Federal Courts class offers the most opportunities (and the best setting) for exploring with students why it matters whether a particular claim is heard first by a state or federal court. This question turns out to startle many students, since they have not had the opportunity or inclination to think much about life in the lower courts. I push students further to consider strategically whether (or when) they might prefer to litigate in federal or state court; and it is fun for them—many for the first time—to recognize that this is not just some academic question but that knowing more about the distinctive features of these courts can have real consequences for litigants.

Fourth, teaching Federal Courts is fun because it provides wonderful opportunities to see how both the practical and theoretical fit together. In my experience, I have found that most law students have a (very) limited tolerance of legal theory. But, a Federal Courts class provides the opportunity for students to test different theories of jurisprudence and to explore their utility. Law students are prone to look for short-cuts, and undoubtedly theories can serve as short-cuts (think here, for instance, about conceiving of judges or Justices, for purposes of such classes, as “nationalists” and “federalists”<sup>7</sup>), but part of the fun of teaching a Federal Courts class is to show students that sometimes they have to take the long way around to solve a problem or that various short-cuts pose difficulties. The point is not to make students’ lives more difficult, but instead to show them that they are able to handle—they have the knowledge and skills to solve—remarkably complex cases.

Last but not least, teaching a Federal Courts class provides an excellent (albeit not the only) opportunity to show that law school can be fun. By the time that many students take a Federal Courts class, most, if not all of them have had the fun knocked out of them. Many of them do not expect the class to be fun. (Maybe they do not expect the class to be fun with me as the instructor, but I try to avoid thinking that.) If anything, they expect it will be hard or at least they are likely to have heard it will be a very difficult class. But, a hard class can still be fun. It need not be dreary. To the contrary, it is

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6. See *supra* note 5 and accompanying text.

7. The terms “nationalists” and “federalists” appear throughout the literature on Federal Courts. By “nationalists,” we typically mean judges or Justices whose basic default rule is to construe ambiguities or gaps in the Constitution in favor of the national government, while “federalists” construe constitutional gaps or ambiguities in favor of the states or state sovereignty.

fun for students to work together to solve complex problems. It is fun for students to discover that they have the abilities and knowledge to maneuver through complex issues. It is fun for students to be assigned to think about problems from different perspectives or vantage points. Indeed, by the time the semester is over, I have assigned my students at various times to think about issues from the perspectives of many of the different players in the federal courts system—plaintiff and defense counsel, counsel to the President or to executive agencies, counsel to House or Senate committees, state officials (such as governors), state and federal district and appellate court judges, state or federal prosecutors, and Supreme Court Justices. The role-playing is almost always fun and enormously illuminating. It is fun to challenge students to rethink their preconceptions or biases about the class, litigation, law school, and state and federal judges. Indeed, it is to this latter challenge—and its centrality in my Federal Courts classes—that I turn in the next part.

## II. THE CHALLENGES OF TEACHING FEDERAL COURTS

Of course, what is fun for me is a major challenge for law students. More precisely, Federal Courts classes pose many challenges for law students; and my principal objective in Federal Courts classes has been to meet each of these challenges head-on.

To begin with, I assume that my experience in teaching Federal Courts has not been unique: the course literally scares off many law students. This is partly because it is a course that is almost always appealing to the students who are on law review or are planning to do clerkships. More than once, I have seen students wander into the first day of my class in Federal Courts, take a look around, and then walk out—always against my entreaties to stay. They do this because they believe that the odds of their doing comparatively well in the course are not good. With rigid curves even in upper level classes, students who are not already at the top of their class or committed to a clerkship are not eager to contend in a hard, elective class against their top-ranked cohorts. While a class filled largely with top-ranked students has the potential to have a good deal of excellent discussion, students who do not take a Federal Courts class are at a comparative *professional* disadvantage: they can learn about federal jurisdiction once they are in practice, but the course would at least have given them some familiarity with the subjects in the field and the skills they need to hone to practice in the federal courts.<sup>8</sup> In short, students will invariably benefit from a Federal Courts class.

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8. I have had, as I have indicated, very limited success in dissuading students from avoiding the class because of concerns that they will not do well. I have tried to counter these concerns by stressing the importance of the class and the fact that non-law-review students often do well in the class, and by making the class as much fun and as relevant as possible to their lives and careers.

I am sure some professors prefer smaller enrollments in their Federal Courts classes. This is not just because they will have fewer examinations to grade but also because the smaller group is bound to consist of those students who really are most committed to, and interested in, taking a Federal Courts class.

Nevertheless, the fact remains that more than a small number of our students will benefit from their knowledge of federal courts. Many of our students will be litigators, and those who do not can still use what they learn to avoid litigation, to evaluate litigation strategies (or litigators), or to appreciate the relationship between what they do and the federal court system.

The second challenge is mastering the complexity of the materials. There is no getting around the fact that Federal Courts is hard. Students need to be diligent, patient, thorough, and thoughtful in analyzing issues of federal jurisdiction. Many students find the materials to be too dry, and many students have not had much, if any, meaningful experience in statutory construction. Nor, for that matter, have they had the opportunity beforehand to integrate or coordinate what they have learned in other classes.

A major way that I have tried to meet the challenge of the subject matter being too dry or complex is to emphasize as a theme of the class the importance and utility of functioning from the perspective of the courts themselves. I ask students time and again how a particular issue (or subject) might seem to a federal district judge (or to a state district judge). At the beginning of the class, students are unlikely to have any idea how to construct this perspective; it is likely to be completely unfamiliar to them. So, I often begin the course by talking about how people become federal judges and asking students about the essential attributes of federal judges. It is important for students to understand as well precisely what litigation in a district or appellate court looks like. I therefore ask students to read the local rules of our state and federal courts and often share with the students the motions and briefs submitted in trial courts. I further ask whether—and why—they might brief issues differently to different courts.

Nevertheless, the perspective, or world-view if you will, of a federal court is not one that comes naturally to law students or is easily or naturally constructed. As those of us who have taught this class know, it is hard work to put together a comprehensive framework of legal analysis; and the work is hard not just because it requires pulling seemingly disparate subjects together but also because of another significant challenge to teaching Federal Courts—students come into the classroom with many preconceptions about federal courts. In fact, there are at least three preconceptions that students—and those of us who teach classes on federal courts—must be prepared to guard against. First, many if not most students will, by the time they take a class on federal courts, still think that only one particular federal court matters and is therefore worth their time to study—the United States Supreme Court. They might



arrive at this preconception for any number of reasons, not the least of which is the (mistaken) belief that every legal question of consequence gets decided by the Supreme Court. Of course, this is not true, and a class on federal courts is as good a place as any to disabuse students of this misconception.

Second, many students might believe that federal judges, particularly Justices, decide cases in one of two ways—either they directly vote their policy preferences or manipulate the law to maximize their political preferences. A Federal Courts class need not be devoted to verifying or falsifying this view, but I do devote an early class to the social science literature on judging and particularly on the problems with many social science models of judging. My aim is therefore to show students that the law is a lot more complicated than what they have presupposed and that if students want to litigate matters in federal courts, there is a lot of law they need to learn—not just federal constitutional law, but also federal statutes and regulations and the interplay between federal and state law. The perspective of federal courts requires knowing its language, practices, traditions, and thought processes.

There are several ways that I have used to help students to try not to be hindered by their preconceptions of judging, and each of these has worked. First, I ask students how they would decide cases as a state or federal district judge. I literally ask them this question, meaning that I assign students to come into class prepared to act as a federal or state district judge. Second, I ask students to act together as judicial panels. This assignment is extremely useful, since it helps students to think about the ramifications of collegial courts and to perceive how the need to maintain collegiality might influence what they do. I also ask students about the kinds of claims they would make if they were the lawyers for the plaintiffs or defendants. The initial, practical effects of these exercises have been to prompt the students to recognize that (1) their arguments must be grounded in legal materials in order to have any persuasive force at all and (2) they need to know something about the courts (particularly the judges or Justices) before whom they are making their arguments.

The third preconception with which many students enter into Federal Courts classes is the belief that federal judges are superior to their state counterparts. Even apart from whether this is empirically valid (and I have never been sure that it is), students in a course on federal courts must learn that state judges often deal with questions of federal law. Moreover, they must figure out whether they or their clients will be better off in a federal court as opposed to a state court. It is not readily apparent why (or how often), as a matter of fact (as opposed to theory), this must be so. Consequently, I make sure, besides asking students to act as state or federal trial courts, to consider how their perspective might differ from that of federal judges. Not surprisingly, students will begin the exercise by insisting that their status as a judge should not make a difference to their analysis, but I remind them to

consider throughout the semester the ramifications, if any, of how people become (and remain) state judges.

Moreover, a persistent theme of the class is to consider litigation strategy—why might plaintiffs prefer to file their cases in state rather than federal court and vice versa. Here, I press students to consider the size of the dockets, the personalities and backgrounds of their local (state and federal) judges, appellate options (i.e., how they assess the relative quality of the state and federal appellate courts in their state or region), and the relative advantages and disadvantages of litigating in state courts of last resort or federal appellate courts (in which the possibility of Supreme Court review is greater), and of course the law itself. Students are often primed to think about the pertinent federal law, but in more than a few cases their clients might fare better under state law.

There are numerous ways to teach students about federal courts, but I have found that the perspective that works best at cutting through the misconceptions (and prejudices) about federal courts and at enabling students to manage the challenge of bringing together what they have learned elsewhere (and may yet learn) into this one class is to conceive of federal courts as problem solvers. For me, it has been especially rewarding (and challenging) to introduce students to the perspective of federal judges as problem solvers. Indeed, all judges are really problem solvers; they are literally asked to solve particular legal problems. This perspective helps students to move past their preconceptions of federal and state judges, and to consider (1) the nature of the problem(s) the court is being asked to solve, (2) the constraints on the court's authority or discretion to decide the problem(s), (3) the options that are available to the court for resolving the problem(s), (4) which option(s) courts might prefer and why, and (5) the possible problem(s) with the options they have chosen.

Of course, it is imperative for students to appreciate that federal judges are special kinds of problem solvers. Students know that federal courts do not have the authority to reach out to decide any kind of problem that they want to address. But, they need to know more. They need to learn about the statutory and other constraints on the discretion (or freedom) of the courts to decide particular issues. They need to learn, in other words, about the problems that confront courts when they are being asked to act as problem solvers.

A class in federal courts is, therefore, a course on the kinds of problems confronting federal judges in discharging their constitutional functions and how they address and solve these problems. To be sure, my focus on problem solving is not meant to direct the students to think in terms of the costs and benefits of the different possible options available to the courts, but rather to consider what options “the law” accords to the courts and the legal and other ramifications of the options that they choose. In the next part, I discuss several

of my experiences in teaching some of the major cases or themes through this perspective.

### III. THE LESSONS OF EXPERIENCE

In this part, I discuss some of my experiences in teaching problems that were unfolding or pending at the time. While I hope that each of these experiences illustrates the utility of encouraging students to think of federal courts as special kinds of problem solvers, two caveats are in order. First, I will not parse the issues raised by each of these examples. To say the least, the issues involved in these cases are quite familiar to Federal Courts scholars, and my point in raising them is not to elucidate the issues but instead to suggest the benefits of having students wrestle with evolving disputes as problems they are being challenged to solve from a variety of perspectives, including that of federal courts. Second, I do not mean to suggest that encouraging thinking of federal courts as problem solvers should be done at the expense of teaching the “law” of federal jurisdiction. Far from it, the law is central to the task of both identifying the problem that needs solving and the possible solution or options available to federal courts. Nor do I mean to suggest that there is anything special or unique about the approach I have taken to teach courses on federal courts. Nevertheless, I have found that students are less intimidated and readier to tackle the complex cases that are endemic to a study of federal jurisdiction when they think of them as real problems with real consequences and not just abstract intellectual puzzles.

I begin with *Bush v. Gore*.<sup>9</sup> It so happened that I was teaching a Federal Courts class in the fall of 2000 and that the timing of the dispute in the case could probably not have been better—for instructional purposes. For the election occurred with a little more than a month of class left, and thus we could follow in class almost all of the legal developments pertaining to the dispute, except its final resolution. In every class until the end of the semester, we talked about the evolving legal developments and their ramifications for understanding federal jurisdiction.

Once it became apparent that Bush and/or Gore might file a lawsuit over the contested results in Florida, I asked my class to begin thinking about the claims that each candidate might make, with which courts they might file those claims, and how those courts might handle those claims. Students were eager to think like courts, but I asked them first to think like the contenders. Once they did, they realized they had to think about the relevant federal and state law, which the students enthusiastically began to research.<sup>10</sup> They

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9. 531 U.S. 98 (2000).

10. It is apparent from this discussion that I had to modify my syllabus in order to make time for the assignments and class discussions on the litigation in the aftermath of the 2000 presidential election. Indeed, I am prepared whenever I teach Federal Courts or any other classes

contemplated the risks of litigation (in either federal or state courts or both) and further researched in which courts they might file their respective lawsuits.

It did not take long for the students who were assigned to represent then-Governor George W. Bush to decide, as did Bush's lawyers, to file their lawsuits in federal rather than state courts. (One argument made in class, as I recall, was that the state courts, based on the political parties of the respective judges, seemed at the trial and appellate levels to be more potentially hostile to Bush than to Gore.) Students assigned to represent Gore did not initially see any real advantage in being the first to go to court, even though they recognized that the Republican Secretary of State of Florida, Kathleen Harris, was likely to rule against Gore's protests against her certification of the final results of the popular vote in the State. Once the cases were filed, I divided the class in half—one-half acting as state judges and the other as federal judges. Interestingly, each side was curious about what the other was doing (oftentimes, looking for ways to defer to the other), and we had interesting discussions about abstention, removal, and certification, among other things. But, students began to split amongst themselves (and deviate from what was happening in the courts below) when they shifted positions to start thinking like judges. This is partly because they were asked to think about what the problem that either side was asking the court(s) to solve was, and they generally concluded that reaching the merits of the lawsuit constituted a bigger problem than avoiding the merits. They foundered over such things as whether Bush or Gore would have standing to raise a claim in federal court (sidestepped if either filed an action in state court), which if any claims constituted non-justiciable political questions, and whether there was a problem (confronting either the state or federal courts) under the Electoral Count Act of 1887.<sup>11</sup> Generally, the students agreed with the federal court judgments in the dispute until the Court granted certiorari to hear Bush's first appeal to the Court in *Bush v. Palm Beach Canvassing Board*.<sup>12</sup> The biggest surprise for the class was the Florida Supreme Court's failure to respond immediately to the remand in that case.

My point in discussing this experience is not to point out that the students did not accurately predict what the Supreme Court (or lower courts) would do but rather that they were thoroughly captivated by studying this incredible

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to make room for unforeseen developments. If something historical is happening while I teach the class, I do not want to pretend it is not happening. Instead, I think of it as the best possible teaching tool. Moreover, I have not found it hard to move assignments around or to make new assignments. The critical things have to do with the importance or magnitude of the unfolding event(s), the size of the class, and my sense of the class's enthusiasm, interest, and energy. So far, I have not gauged wrong, but I am always mindful of the potential pitfalls.

11. 3 U.S.C. § 5 (2006).

12. 531 U.S. 70 (2000).

dispute in real time. They were eager to do the extra work (which either replaced assignments or served as excellent review or supplementary material) and then, to see to what extent the lawyers and courts tracked what they found or determined. They felt fully informed to assess the various state and federal judicial rulings. The only case that eluded their review was the Court's final opinion, which came down during our exam period. Nevertheless, students came to my office during exams to discuss their assessment of the decision. In general, my purpose was to encourage the students to develop sensible arguments from the pertinent legal materials, and they did. It did not matter whether the Court came out precisely where the students did. What mattered was the students' appreciation of the options available to the courts, the quality and coherence of their reasoning, and the ramifications of their possible decisions.

My second experience in having students tackle a dispute unfolding in real time came a few years later when I was asked to testify before the House Judiciary Committee on a few proposed court-stripping measures. The gist of the proposals was to strip lower federal courts of jurisdiction over any claims pertaining to public acknowledgments of God.<sup>13</sup> I take great delight, as I have said, in pushing the class to consider issues pertaining to the parity of state and federal courts, including the possible problems of depriving lower federal courts of jurisdiction over politically salient issues. (We know such proposals are introduced in just about every Congress, so it is not hard to find contemporary examples for class discussions.) I did not present the constitutionality of these proposals to the class as part of my preparation to testify. Instead, it just seemed that the class might find them interesting, particularly since they involved many of the issues we had been discussing in class. Consequently, this class, like the one before had done with *Bush v. Gore*, began to consider the problems, if any, with having state courts hear the federal claims removed from federal jurisdiction. While the class sharply disagreed over whether it was even a problem for state courts to end up with exclusive jurisdiction over these claims, the exercise really seemed to help many students recognize the differences between the so-called internal and external constraints on Congress's power to regulate the jurisdiction of the federal courts. The nature and magnitude of the problem turned, in the judgment of most students, on whether there was Supreme Court review of the state court judgments. If there were such review, then most students seemed prepared to accept the court-stripping measures. But, in the absence of such review, almost all the students figured state courts would (or should) have struck down the pertinent legislation. There were a few who maintained that the lower federal courts would still have jurisdiction to decide if they had

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13. For my dialogue with Martin Redish on these issues, see Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347 (2005).

jurisdiction and that this authority included their power to rule on the constitutionality of the proposed court-stripping measures. Throughout the discussions, the class made good use of the pertinent materials in the casebook (and their recollections of first-year Constitutional Law).

It was hard for the students to specify the problem that the state courts were confronting. After some prodding and further research, they began to ponder the scholarly arguments on why some inferior judicial review might be constitutionally required. It was generally harder for the students to see why this issue was important if Supreme Court review of the state court proceedings on the federal claims were possible. We spent a lot of time on clarifying the “harm” of excluding lower court review of the claims. But, it became as much of a problem for the students to determine the “harm” or “problem” with eliminating Supreme Court review of the claims altogether. We spent a good while talking about the “essential functions” of the Court and the internal and particularly the external constraints on the power of Congress to regulate federal jurisdiction.

On the question of the Court’s “essential” functions, I must confess I sometimes stray from real-world disputes to ask students about what they think about my friend Michael Paulsen’s intriguing proposal that Congress should restrict (or dictate) the grounds on which the Supreme Court may overrule prior constitutional decisions.<sup>14</sup> I usually wait to raise this question until we run into a case involving an overruling, something that usually does not require much of a wait. Once we do, and the class has reviewed the different standards for overruling prior erroneous decisions of the Supreme Court, I ask students to read the Paulsen article and Richard Fallon’s terrific response to it<sup>15</sup> and then to come to class as members of the House Judiciary Committee to consider approving Paulsen’s proposal. Few topics ever seem to generate more lively discussion, and none seem to draw the students into a more prolonged, thoughtful discussion of (1) the “essential functions” of the Court and (2) whether Congress is barred from interfering with or regulating them.

The final example of teaching federal courts as problem-solvers is the problem of the scope of municipal liability under 42 U.S.C. § 1983 for inadequate police training. It so happened that this was the subject of my first law review article,<sup>16</sup> and I was on the verge of completing the article when it became apparent that the Supreme Court was considering the issue. Of course, this had been a big issue for other federal courts for some time, and it would

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14. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

15. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

16. See Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989).

have been easy to find numerous cases wrestling with this issue before *City of Canton v. Harris*.<sup>17</sup> However, I found myself teaching Federal Courts for the first time around the time that the Court was considering *Harris*.

Prior to *Harris*, the Court had not spent much time clarifying the relationship between the Eleventh and Fourteenth Amendments. It thus took longer for students, who had been asked to represent the municipality, to see how the Eleventh Amendment helped them. They did a lot of grappling with the nature of § 1983, and, as anyone who teaches this area knows, found dozens of lower court cases on inadequate police training. Relying on these cases, they emphasized the need for restricting municipal liability for inadequate police training. Interestingly, they pondered whether (or to what extent) the Constitution protected affirmative as opposed to negative rights and defended the view that it only protects the former (and thus there was no basis for a § 1983 action given that there were no federal rights violated in the case.) It did not take them long to appreciate that § 1983 allows for monetary damages for violations of federal rights, and so they stressed that, without some limitation, the federal courts could destroy a city's finances. They thought it patently unfair that the tax money collected from people who had no relationship to the case was going to be diverted into the plaintiffs' pockets.

The students on the other side mounted their own sophisticated arguments. They relied on the plain language of the Fourteenth Amendment and argued that § 1983 should be construed as abrogating the state's Eleventh Amendment immunity (an unsuccessful argument they would soon learn). They emphasized the unfairness of the remedies left to the plaintiffs if there were no federal jurisdiction. They also suggested the possibility that the municipality would have insurance policies (or subrogation) to ensure that they would not be bankrupted by court cases like this.

Once the students shifted their focus to how the courts would decide the case, it took them almost no time at all to arrive at the point at which the Supreme Court eventually did in *City of Canton v. Harris*. They perceived the cases as persistently balancing the competing considerations of vindicating federal rights and protecting local and state treasuries. Consequently, they proposed a strict standard that had to be met in order for a plaintiff to recover monetary damages from a municipality for something like inadequate police training.

My point, again, is not to stress that the students were able somehow to foresee what the Court would do. Instead, my point is that the students became intimately and energetically (and even creatively) engaged in our discussions. By wrestling with the materials to solve a real question of law, they came better to understand them.

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17. 489 U.S. 378 (1989).

## CONCLUSION

It is almost as much fun to write about teaching Federal Courts as it is to teach the class. There is insufficient space to list all the reasons for enjoying teaching the class and all the ways in which one could no doubt teach it. Here, I have discussed what I have found to be the utility of teaching students to think of federal judges as tasked to decide various problems. I enjoy doing this for several reasons, not the least of which is that it introduces students to a side of the federal courts they might not have thought about before. Students are likely to be hampered by their preconceptions about judging, and thinking of federal courts as problem solvers provides them with a relatively novel, intriguing outlook on federal jurisdiction. It certainly gets students to put aside not only their preconceptions of what judges do (and how they think), but also the political rhetoric about judges being activists or not and the social science literature describing judges as policymakers who wear robes. Instead, students can be challenged to ponder whether the perspective I propose fits *and* how judges would actually proceed to function as special kinds of problem solvers.

No doubt, a possible problem in teaching Federal Courts (either at all or as special kinds of problem solvers) is to figure out which of the many problems that federal courts have been asked to solve are worthy of study in a semester. I have taught the class as both a three-hour and four-hour class, neither of which seems to be enough time to get to all that I would like to do. I marvel at how much we typically cover in only a semester of Federal Courts. No doubt, this is one of the challenges in both teaching and taking the course. I work hard to resist the temptation to rush through too many topics and to figure out the essentials that should be taught in the basic class on federal jurisdiction. I intend to work just as hard to convince our dean that maybe we should offer more advanced courses on federal jurisdiction. I already know whom I would like to recommend to teach those courses.



